

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	
	)	
Petitions for Declaratory Ruling and Retroactive	)	
Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)	)	
Regarding the Commission's Opt-Out Notice	)	
Requirement for Faxes Sent with the Recipient's	)	
Prior Express Permission	)	

**APPLICATION FOR REVIEW**

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December 2, 2016

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**APPLICATION FOR REVIEW**

Pursuant to Section 1.115 of the Commission’s rules, TCPA Plaintiffs<sup>1</sup> seek review by the full Commission of the Order issued by the Consumer & Governmental Affairs Bureau on November 2, 2016, purporting to grant “retroactive waivers” from 47 C.F.R. § 64.1200(a)(4)(iv), the regulation requiring “opt-out notice” on faxes sent with “prior express invitation or permission,” to 22 petitioners.<sup>2</sup> For the reasons below, the Commission should vacate all of these waivers as beyond the Commission’s authority and as untimely.

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<sup>1</sup> The parties who are plaintiffs in pending private TCPA actions against the waiver petitioners (“TCPA Plaintiffs”) filing this Application are Lawrence S. Brodsky; JT’s Frames, Inc.; Career Counseling, Inc. d/b/a Snelling Staffing Services; Big Thyme Enterprises, Inc.; Whiteamire Clinic, P.A., Inc.; Cin-Q Automobiles, Inc.; Medical & Chiropractic Clinic, Inc.; Shaun Fauley; St. Louis Heart Center, Inc.; JWD Automotive, Inc.; Russell M. Holstein, PhD, LLC.; Carradine Chiropractic Center, Inc.

<sup>2</sup> *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket Nos. 02-278, 05-338, 2016 WL 6538219 (CGAB Nov. 2, 2016) (“November 2, 2016 Order”).

### **Questions Presented**

Pursuant to Section 1.115(b), this Application identifies three questions for review:

(1) Whether the “retroactive waivers” granted in the Bureau’s November 2, 2016 Order are invalid for the same legal reasons articulated in TCPA Plaintiffs’ pending applications for review from the Bureau’s August 28, 2015 and December 9, 2015 Orders, where (a) the Commission has no power to “waive” a defendant’s statutory liability for violation of the “regulations prescribed under” the TCPA, and (b) the contemporaneous record, which was not before the Commission in deciding the October 30, 2014 Order, shows that regulated parties understood perfectly well that the 2006 regulations implementing the JFPA required opt-out notice on faxes sent with prior express permission, and there is no evidence in the record that any person was ever actually confused about that requirement.

(2) Whether the Bureau erred in finding the Humana Petition timely where it was not filed until December 18, 2015, nearly eight months after April 30, 2015, the date by which the Commission “expected” parties to “make every effort” to file a waiver petition, and Humana had actual knowledge of the opportunity to seek a waiver no later than September 29, 2014.

(3) Whether the Bureau erred in finding the BLP Petition timely where it was not filed until April 28, 2016, nearly one year after the expected date, where BLP is represented by the same law firm that filed the Anda Petition that lead to the October 30, 2014 Order and therefore had actual knowledge of the Commission’s “expectation” that parties seek waivers by April 30, 2015.

### **Procedural Background**

On October 30, 2014, the Commission issued the “Opt-Out Order,” denying 24 petitions challenging the validity of 47 C.F.R. § 64.1200(a)(4)(iv),<sup>3</sup> but granting retroactive “waivers” purporting to relieve the covered petitioners from liability for violations of that regulation in private lawsuits filed under the TCPA’s private right of action, 47 U.S.C. § 227(b)(3).<sup>4</sup> The Commission allowed “similarly situated” parties to petition for waivers, but stressed that “in light of our confirmation here that a fax ad sent with the recipient’s prior express permission must include an opt-out notice, we expect that parties will make every effort to file within six months of the release of this Order.”<sup>5</sup> The Commission directed the Bureau “to conduct outreach to inform senders of the opt-out notice requirement.”<sup>6</sup> The Commission repeated, “[w]e expect parties making similar waiver requests to make every effort to file within six months of the release of this Order.”<sup>7</sup>

Between October 30, 2014, and April 30, 2015, over 100 parties filed waiver petitions.<sup>8</sup> Not all petitioners were current TCPA defendants. For example, Truckers B2B, LLC, filed a petition April 28 explaining that, although it had not been sued, it sought a waiver because it was

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<sup>3</sup>*In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel. Oct. 30, 2014), ¶¶ 19–20, 32 & n.70.

<sup>4</sup> *Id.* ¶¶ 22–31.

<sup>5</sup> *Id.* ¶ 2.

<sup>6</sup> *Id.*; *see also* Statement of Comm’r O’Rielly Concurring in Part and Dissenting in Part at 25 (“At my request, staff has committed to engage in significant outreach to ensure that fax senders, including those that might not normally follow FCC proceedings, will be aware of the opt-out requirement.”).

<sup>7</sup> *Id.* ¶ 30.

<sup>8</sup> *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket Nos. 02-278, 05-338, 2015 WL 5120879, at \*1 (CGAB Aug. 28, 2015) (“August 28, 2015 Bureau Order”).

“concerned that it could one day face significant liability” for opt-out-notice violations.<sup>9</sup> Wells Fargo filed a petition April 29 explaining it was not currently being sued for opt-out notice violations but was seeking a waiver “as a prophylactic measure.”<sup>10</sup>

On August 28, 2015, the Bureau issued an order granting all 117 follow-on waiver petitions.<sup>11</sup> It also granted the Truckers B2B and Wells Fargo petitions, finding there was no requirement “that faxers currently face lawsuits or potential liability to qualify for the waiver.”<sup>12</sup> Numerous parties filed applications for review of the August 28, 2015 Bureau Order, which are pending before the Commission.<sup>13</sup>

On December 9, 2015, the Bureau granted an additional five waiver petitions, some of which were filed after April 30, 2015.<sup>14</sup> The Bureau rejected the argument that these petitions were untimely, stating “we decline to reject petitions solely on the basis that they were filed after April 30, 2015.”<sup>15</sup> The Bureau reasoned the petitions “sought waiver for faxes sent prior to the April 30, 2015 deadline imposed by the *2014 Anda Commission Order* for compliance by the waiver recipients there,” and so “granting waivers to the five parties here does not contradict the

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<sup>9</sup> *Petition for Waiver by Truckers B2B, LLC*, CG Docket Nos. 02-278, 05-338, at 2 (filed Apr. 28, 2015).

<sup>10</sup> *Petition of Wells Fargo & Co. for Waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules*, CG Docket Nos. 02-278, 05-338, at 5 (filed Apr. 29, 2015).

<sup>11</sup> August 28, 2015 Bureau Order ¶ 24.

<sup>12</sup> *Id.* ¶ 19.

<sup>13</sup> *E.g.*, Application for Review filed by Beck Simmons, LLC; Physicians Healthsource, Inc.; Radha Geismann, M.D., P.C.; Sandusky Wellness, LLC; Alan L. Laub, DDS, Inc.; North Branch Pizza & Burger Co.; True Health Chiropractic, Inc.; Alan Presswood, D.C., P.C.; Carradine Chiropractic Center, Inc.; Christopher Lowe Hicklin, DC, PLC; J. Barrett Company, Central Alarm Signal, Inc.; St. Louis Heart Center, Inc.; Eric B. Fromer Chiropractic, Inc.; Arnold Chapman; Shaun Fauley; Keith Bunch Associates, LCC; Michael C. Zimmer, D.C., P.C.; Wilder Chiropractic, Inc.; Law Office of Stuart R. Berkowitz; Proex Janitorial, Inc.; Italia Foods, Inc., CG Docket Nos. 02-278, 05-338 (Sept. 28, 2015).

<sup>14</sup> *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket Nos. 02-278, 05-338, 2015 WL 8543949, at \*1 (CGAB Dec. 9, 2015) (“December 9, 2015 Bureau Order”).

<sup>15</sup> *Id.* ¶ 18.

purpose or intent of the initial waiver order because these parties are similarly situated to the initial waiver recipients.”<sup>16</sup>

On November 2, 2016, the Bureau granted an additional 22 waiver requests, *all* of which were filed after April 30, 2015.<sup>17</sup> The Bureau made clear that, as it interprets the October 30, 2014 Order, there is no “deadline” to file a waiver petition and that the Commission merely “requested” that parties file by April 30, 2015.<sup>18</sup> According to the Bureau, the “only deadline” imposed by the October 30, 2014 Order is the “deadline for compliance with the regulation,” which in the Bureau’s view is April 30, 2015.<sup>19</sup>

### **Argument**

#### **I. The Commission should rule all waivers granted in the November 2, 2016 Order invalid for the reasons in TCPA Plaintiffs’ pending application for review from the August 28, 2015 Order.**

On September 28, 2015, over two dozen TCPA Plaintiffs filed an Application for Review of the Bureau’s August 28, 2015 order granting 117 waiver petitions.<sup>20</sup> TCPA Plaintiffs in this Application adopt and incorporate the same arguments in this application for review, including that (1) the Commission has no authority to “waive” liability in a private TCPA right of action pending in a court of law and (2) the contemporaneous evidence shows the “industry”

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<sup>16</sup> *Id.*

<sup>17</sup> November 2, 2016 Order ¶ 18, n.70.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Application for Review filed by Beck Simmons, LLC; Physicians Healthsource, Inc.; Radha Geismann, M.D., P.C.; Sandusky Wellness, LLC; Alan L. Laub, DDS, Inc.; North Branch Pizza & Burger Co.; True Health Chiropractic, Inc.; Alan Presswood, D.C., P.C.; Carradine Chiropractic Center, Inc.; Christopher Lowe Hicklin, DC, PLC; J. Barrett Company, Central Alarm Signal, Inc.; St. Louis Heart Center, Inc.; Eric B. Fromer Chiropractic, Inc.; Arnold Chapman; Shaun Fauley; Keith Bunch Associates, LCC; Michael C. Zimmer, D.C., P.C.; Wilder Chiropractic, Inc.; Law Office of Stuart R. Berkowitz; Proex Janitorial, Inc.; Italia Foods, Inc., CG Docket Nos. 02-278, 05-338 (Sept. 28, 2015).

immediately understood opt-out notice was required on faxes sent with prior express permission, and there is no evidence to support a “presumption of confusion.”

The Bureau’s legal justifications for the November 2, 2016 Order are the same as its justifications for the August 28, 2015 Order, and it should be reversed for the same reasons.

## **II. The Commission should deny the Humana Petition as untimely.**

Commenter Lawrence S. Brodsky is the Plaintiff in a private TCPA action against waiver recipient HumanaDental Insurance Co. (“Humana”).<sup>21</sup> As Plaintiff explained in great detail in its comments opposing Humana’s waiver petition, Humana attempted to challenge the validity of the opt-out notice regulation in district court in violation of the Hobbs Act for years.<sup>22</sup> On September 29, 2014, the district court held that the plain language of the rule “*does* apply to faxes sent with the permission of the recipient” and that “any direct or indirect challenge to the FCC’s authority to promulgate the regulations or to whether a private right of action exists, at this time, should be through the FCC’s administrative processes.”<sup>23</sup>

The court noted that “numerous petitions have been made to the FCC seeking a declaratory ruling as to the scope of its rulemaking authority regarding the requirement of opt-out notices in unsolicited *and* solicited advertisements.”<sup>24</sup> The district court cited three decisions Humana relied on in its motion, noting these courts did not rule on the Commission’s authority, but instead “stayed the case pending resolution of the administrative proceedings.”<sup>25</sup> The district

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<sup>21</sup> *Brodsky v. HumanaDental Ins. Co.*, No. 10-cv-3233 (N.D. Ill.).

<sup>22</sup> Pl.’s Comments on Humana Pet. (Feb. 12, 2016).

<sup>23</sup> *Brodsky v. HumanaDental Ins. Co.*, 2014 WL 4813147, at \*6 (N.D. Ill. Sept. 29, 2014) (hereinafter “*Brodsky II*”).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* (citing *Kaye v. Merck & Co., Inc.*, 2014 WL 2002447, at \*2 (D. Conn. May 15, 2014); *Physicians Healthsource, Inc. v. Purdue Pharma L.P.*, 2014 WL 518992, at \*3 (D. Conn. Feb. 3, 2014); *Raitport v. Harbour Capital Corp.*, 2013 WL 4883765, at \*1 (D.N.H. Sept. 12, 2013)).



court asked Humana “whether a stay is appropriate in light of the ongoing administrative proceedings on the relevant TCPA issues.”<sup>26</sup>

Humana did not seek relief from the Commission, as advised by the district court, or ask for a stay. Instead, it waited until December 18, 2015, to file a petition. Humana’s petition did not mention the requirement that parties “make every effort” to file petitions by April 30, 2015.<sup>27</sup> Humana did not claim it made any effort to file by that date but was unable to do so or explain why it waited until nearly eight months after the deadline.<sup>28</sup> Instead, Humana argued the Commission merely “suggested” that parties file waiver requests by April 30, 2015.<sup>29</sup>

Plaintiff filed comments opposing the Petition, arguing that if Humana is right and the Commission’s “expectation” that parties file by April 30, 2015 was merely a “suggestion,” then the Commission will be entertaining opt-out waiver requests for many years, even past April 30, 2019, when the four-year statute of limitations on private TCPA claims runs out on faxes sent prior to April 30, 2015, given that the limitations period is often tolled (*e.g.*, by the pendency of a related class action).<sup>30</sup>

The Bureau sided with Humana, ruling that there is no “deadline” for waiver requests and that the Commission merely “requested” that petitioners seek waivers by April 30, 2015.<sup>31</sup>

The Commission should now make clear that its “expectation” that parties file by April 30, 2015, was not mere surplusage and deny Humana’s waiver. Under the Bureau’s reading, a

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<sup>26</sup> *Id.*

<sup>27</sup> Humana Pet. at 5–6.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974); *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983); *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 562 (7th Cir. 2011) (TCPA fax class action tolled by prior pending class action).

<sup>31</sup> November 2, 2016 Order ¶ 18, n.70.

party can send its faxes on April 29, 2015, be sued on April 29, 2019 (the last day of the four-year statute of limitations period), then attempt to litigate the validity of the opt-out regulation for six years in district court in violation of the Hobbs Act (as Humana did), and then file a waiver request in April 2025. Under the Bureau's rationale, that petition will have to be granted. That cannot be what the Commission intended when it stated the waivers were designed to offer "temporary" relief.

### **III. The Commission should deny the BLP Petition as untimely.**

Applicants Cin-Q Automobiles, Inc. and Medical & Chiropractic Clinic, Inc. are the Plaintiffs in private TCPA litigation pending in the United States District Court for the Middle District of Florida against waiver recipient Buccaneers Limited Partnership ("BLP").<sup>32</sup> As detailed in Plaintiffs' comments opposing the BLP waiver petition, BLP engaged in a massive junk-faxing campaign in 2009 and 2010, sending a total of 343,122 advertisements for tickets to Tampa Bay Buccaneers games to 131,011 unique fax numbers in the Tampa area.

Numerous consumers filed complaints with the Commission about BLP's junk faxes. In response to Plaintiffs' counsel's FOIA request, the Commission produced several such consumer complaints, although it stated that additional complaints may not have been retained, since they were filed prior to 2011.<sup>33</sup> There were also numerous complaints to the FTC, which also produced such complaints to Plaintiffs' counsel.<sup>34</sup> It does not appear the Commission or the FTC took any action against BLP based on these complaints.<sup>35</sup>

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<sup>32</sup> *Cin-Q Automobiles, Inc. v. Buccaneers Ltd. P'Ship*, No. 13-cv-1592 (M.D. Fla.).

<sup>33</sup> Commission FOIA Response (March 24, 2014), attached to Hara Decl., Ex. G.

<sup>34</sup> FTC FOIA Response (Jan. 9, 2013), Hara Decl., Ex. H.

<sup>35</sup> *Id.*

After litigating the case for years, BLP filed a waiver petition on April 28, 2016. BLP acknowledged that its petition was filed nearly one year after April 30, 2015, but stated the Commission merely “encouraged” parties to file by that date.<sup>36</sup> BLP did not claim it made any effort to file by April 30, 2015, or explain why it waited until a year later.<sup>37</sup> BLP asserted instead that “the date was not fixed and allowed for waivers to be granted after that date,” citing the December 9, 2015 Bureau Order.<sup>38</sup>

Plaintiffs filed comments in opposition to the BLP Petition arguing that BLP is represented in the underlying TCPA litigation by Latham & Watkins, the law firm that filed the Anda Petition that led to the October 30, 2014 Order, and argued BLP clearly knew about the opportunity to seek a waiver prior to April 30, 2015, but simply chose not to.

The Bureau sided with BLP, ruling that there is no “deadline” for waiver requests and that the Commission merely “requested” that petitioners seek waivers by April 30, 2015. As argued above, the Commission should make clear that its “expectation” that parties file by April 30, 2015, was not mere surplusage and deny the BLP waiver.

### **Conclusion**

The Commission should vacate all of the waivers granted in the November 2, 2016 Bureau Order because the Commission cannot “waive” a party’s statutory liability and the contemporaneous evidence shows regulated parties understood the opt-out regulation in 2006 and were not “confused” by it. The Commission should deny the Humana and BLP waiver petitions because these parties had actual knowledge of the opportunity to seek a waiver by April

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<sup>36</sup> BLP Pet. at 3.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

30, 2015, but chose not to do so, and the Commission's "expectation" that parties file petitions by that date must be given effect.

Dated: December 2, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Brian J. Wanca, do hereby certify that on December 2, 2016, I caused the foregoing Application for Review to be served on the parties listed on the attached service list via U.S. first-class mail, postage prepaid.

s/Brian J. Wanca\_\_\_\_\_